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ILLUMINATING THE CJEU's BLINDSPOT OF INTERSECTIONAL DISCRIMINATION

Abstract
The CJEU decided its first ever discrimination claim argued explicitly on two grounds – sexual orientation and age – on 24 November 2016. It found that no discrimination could exist on both grounds where no discrimination existed on the grounds considered separately. With this, the Court rejected the possibility of recognising discrimination based on two grounds combined together and thus the relevance of intersectionality in EU discrimination law. This note critiques the decision in *Parris v Trinity College Dublin* not only for disregarding intersectional discrimination but also for its weak single ground analysis. In particular, the note argues that the Court failed: (i) to appreciate the normative basis of intersectionality – as creating unique patterns of disadvantage based on a combination of grounds – and how it transpires in practice; and (ii) in the alternative, to apply the Employment Directive 2000/78 correctly to claims of sexual orientation and age discrimination and in light of its discrimination jurisprudence. The failure in *Parris* thus signifies a lost opportunity for the Court to address complex forms of structural inequality in EU law.

Keywords
Intersectionality, EU Law, Sexual Orientation, Age, Discrimination

A. INTRODUCTION

EU law's tryst with intersectionality has been a peculiar one. The surge in the growth of EU discrimination law in 2000s coincided with the demands for recognising intersectionality understood as disadvantage suffered on more than one ground. Since then, law,[1] policy,[2]

[1] See Race Directive 2000/43/EC, recital 14; Employment Equality Directive 2000/78/EC, recitals 2, 3, 10 and arts 4(2), 6(2); Gender Directive (Recast) 2006/54/EC, recitals 3, 11, 23, 24 and arts 6, 8(2), 9(1)(c), 11(a), 13.

[2] See esp reports commissioned by the European Commission: S. Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (2016) at http://ec.europa.eu/justice/gender-equality/document/files/intersectionality.pdf (last accessed 15 February 2017); S. Burri and D. Schiek, 'Multiple Discrimination in EU Law Opportunities for Legal Responses to Intersectional Gender Discrimination?' (2009) at http://ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009_en.pdf (last accessed 15 February 2017); 'Tackling Multiple Discrimination Practices, Policies and Laws' (2007) at http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=51&type=2&furtherPubs=no (last accessed 15 February 2017); and the European Parliament: K. Davaki et al, 'Discrimination Generated by the Intersection of Gender and Disability' (2013) at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493006/IPOL-FEMM_ET(2013)493006_EN.pdf (last accessed 15 February 2017).

and scholarship[3] have progressively acknowledged that grounds like race, sex, religion, disability, age and sexual orientation can intersect to produce discrimination. This is peculiar because intersectionality's journey in other jurisdictions especially its birth site – USA – started with the repeated failures of test cases argued on multiple grounds.[4] In response, academics mounted the intersectionality theory and thus began the struggle to have it recognised in US discrimination law. Aware of this challenging history, EU institutions and academics pre-emptively posited trenchant accounts of how to avoid such failures in their own context.[5] Given this longstanding effort, it is somewhat surprising that the Court of Justice of the European Union's (CJEU) first intersectional case decided explicitly on the grounds of sexual orientation and age failed to appreciate intersectionality. Instead of judicially backing the recognition of intersectionality in discrimination law, the First Chamber decision in *Parris v Trinity College Dublin*[6] gave a short shrift to intersectional discrimination in EU Law. In this way, *Parris* signifies a lost opportunity for the Court to recognise and redress complex forms of structural inequality in EU Member States.[7]

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3 See seminal contributions from D. Schiek and A. Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011); D. Schiek and V. Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009); K. Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2012) 13 *European Anti-discrimination Law Review* 20; S. Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 *European Anti-Discrimination Law Review* 13; D. Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law' (2005) 12 *Maastricht Journal of European and Comparative Law* 427.

4 *DeGraffenreid v General Motors* 413 F Supp 142 (ED Mo 1976); *Rogers v American Airlines* (1981) 527 F Supp 229 (SDNY); *Payne v Trevanol* 673 F 2d 798 (5th Cir 1982); *Moore v Hughes* 708 F 2d 475 (9th Cir 1983). All these cases in the USA were brought by Black women on the grounds of both race and sex discrimination. See also other notable failures of intersectional claims in the UK*: Bahl v The Law Society* [2004] EWCA Civ 1070 (UK Court of Appeal); and Canada: *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (Supreme Court of Canada).

5 See references above nn (2)–(3).

6 Case C-443/15 *Parris v Trinity College Dublin* [2017] ICR 313 (CJEU).

7 Cf Advocate General Sharpston's opinion in Case C-227/04 P *Maria-Luise Lindorfer v Council of the European Union* [2007] ECR I-6767 (CJEU), which specifically dealt with the discrimination claim on the grounds of age and sex both. This remains the only other instance of a discrimination claim to have been explicitly discussed on two grounds other than *Parris*. The CJEU in *Lindorfer* however did not address the question of intersectionality. There are though, cases which have been argued, but neither discussed nor decided on multiple grounds by the CJEU. See in particular, Case C-415/10 *Galina Meister v Speech Design*

This note examines the setback in *Parris*. It takes a close look at the CJEU's reasoning rejecting the existence of intersectional discrimination based on a combination of two grounds when no such discrimination exists on the grounds taken in isolation. Part B recapitulates the facts and reasoning of the *Parris* decision. Part C argues that the CJEU's failure in *Parris* is first and foremost a normative one in that the Court takes a narrow view of discrimination to be based on a single ground at a time and thus fails to appreciate patterns of disadvantage created by the combination of grounds. Part D shows that this normative failure leads to and is accompanied by a lack of practical engagement with how intersectional claims based on multiple grounds transpire. In particular, it highlights the complex nature of the claim as based on one ground directly (age) but causing indirect discrimination based on two grounds (age and sexual orientation). Part E argues that even if the Court were to respond to *Parris* as a matter of single ground discrimination based on sexual orientation and age separately, its analysis under the Employment Directive 2000/78 fails in appreciating at least two things – (i) the strict or narrow application of exceptions or justifications in a way that does not override the equality and non-discrimination guarantee per se; and (ii) the importance of carrying out proportionality analysis in discrimination claims. Had the Court appreciated these, it could have appreciated intersectional discrimination *within* the individual grounds of sexual orientation and age, by adopting a 'capacious' view of each—an approach familiar to the Court from its previous case law. Thus, in the final analysis, the CJEU's decision undermines the juridical significance of intersectionality in EU law, in that *Parris* exemplifies exactly the kind of discrimination claim

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Carrier Systems GmbH [2012] ECR 000 (CJEU) [2], [29]. There are also cases which appear to have multiple grounds relevant to them such as age and sex, though they have not been argued, discussed, or decided by the CJEU as such. See Case C-43/75 *Defrenne v Sabena* [1976] ECR 45 (CJEU); Case C-152/84 *Marshall v Southampton Health Authority* [1986] ECR 723 (CJEU); Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 (CJEU); Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* [2010] All ER (EC) 867 (CJEU).

which finds it difficult to succeed in the absence of it. But it also shows that in the alternative, the CJEU's single ground analysis too appears unconvincing in light of its own doctrine. Part F concludes with this thought.

B. THE DECISION IN *PARRIS*

David Parris had been in a relationship of over thirty years with his same-sex partner. Their relationship was legally recognised in 2011 when Ireland passed the Civil Partnership Act. At this point, Mr Parris was 64 year's old. Under his occupational benefit scheme, Mr Parris' partner would have been barred from receiving a survivor's pension because they had not entered into a civil partnership before he turned 60. But the lack of a national law allowing same-sex partners to contract civil partnerships in 2006 – the year Mr Parris turned 60 – had made it impossible for them to satisfy this rule. Mr Parris challenged the rule as discriminatory on the grounds of sexual orientation and age under the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The Labour Court (Ireland) referred the dispute to the CJEU for a preliminary ruling. It asked three questions: first, whether the impugned rule was discriminatory on the ground of sexual orientation contrary to Article 2 of Directive 2000/78; secondly, should the answer to the first question be in the negative, if the rule was discriminatory on the ground of age contrary to Article 2 of Directive 2000/78; and finally, should the answer to the previous question also be in the negative, if the rule was discriminatory on the basis of the

'combined effect' of age and sexual orientation.[8] The CJEU answered all the questions in the negative.

In regards sexual orientation, the Court first confirmed that the rule did not directly discriminate under Article 2(2)(a) of Directive 2000/78 since it did not explicitly refer to the member's sexual orientation.[9] It then proceeded to consider whether the rule was indirectly discriminatory under Article 2(2)(b)(i) of Directive 2000/78. But instead of analysing whether under the definition of indirect discrimination the rule constituted an apparently neutral provision, criterion or practice which put persons having a particular sexual orientation at a particular disadvantage compared with others, the Court simply resorted to Recital 22 of Directive 2000/78 which provides that the Directive is without prejudice to national laws on marital status. The Court found that because Recital 22 put no obligation on Ireland to legally recognise civil partnerships or benefits dependant thereon,[10] the rule did not produce indirect discrimination on grounds of sexual orientation.[11]

In regards to age, the Court found that the rule established difference in treatment based directly on the criterion of age, but was ultimately justified under Article 6(2) of Directive 2000/78. According to Article 6(2), Member States could, notwithstanding Article 2(2), provide for fixing occupational social security based on age provided that it did not result in discrimination on the grounds of sex. The Court held that the impugned rule simply fixed an age for entitlement to an old age benefit and hence did not constitute discrimination on the ground of age because it was covered by Article 6(2).[12]

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8 *Parris* (n 6) [29] [79].
9 ibid [49] [50].
10 ibid [59] [60].
11 ibid [61].
12 ibid [75] [76].

Finally, the Court summarily dismissed the third question by stating that discrimination could not result from a combination of grounds when no discrimination was found on the basis of each of the grounds taken in isolation.[13] Thus, when the rule did not discriminate on the basis of sexual orientation and age considered independently; it could not produce discrimination on the basis of both considered together.[14]

The failure of the claim in *Parris* is centrally based on the Court's absence of an intersectional perspective. This is visible both in the Court's denial of the 'combined' nature of the claim based on the grounds of sexual orientation and age, as well as, its rigid single ground analysis which could not account for intersectionality *within* sexual orientation and age taken separately but interpreted capaciously. The next three sections unpack these claims.

C. UNDERSTANDING INTERSECTIONAL DISCRIMINATION

The key failure in *Parris* was the inability of the Court to see the claim as a matter of intersectional discrimination based on both sexual orientation and age at the same time. The first conceptual error lies in treating the claim as separate questions of discrimination based on, first, sexual orientation; then in the alternative, age; and failing both, the combined effect of sexual orientation and age. According to the Court, since neither sexual orientation nor age discrimination were established independently, there was no basis for finding 'combined' discrimination because:

> while discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more

[13] ibid [80].
[14] ibid [81].

than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.[15]

The reasoning uncannily mirrors the earliest repudiation of intersectionality in *DeGraffenreid v General Motors*.[16] In deciding one of the first cases explicitly argued on the grounds of race and sex in the US, the District Court of Missouri in *DeGraffenreid* had declared that 'the lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.'[17] Any other interpretation would have meant the creation of a 'new special sub-category' or 'special class' for the grant of a 'new "super-remedy"' beyond the contours of the non-discrimination guarantee under Title VII of the Civil Rights Act 1964.[18] The *DeGraffenreid* Court thus went on to examine Black women's claim argued on both the grounds of sex and race as—first, a matter of sex discrimination, and then, race discrimination. The claim failed on both counts. *DeGraffenreid* thus became the centre of Kimberlé Crenshaw's critique which gave rise to intersectionality theory in 1989.[19] Since then, the US jurisprudence has evolved to recognise intersectional claims based on two grounds at most.[20]

Almost three decades later, the CJEU repeats the *DeGraffenreid* error of reducing a claim based on two grounds to two discrete claims, each based on sexual orientation and

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15 ibid [80].

16 *DeGraffenreid* (n 4).

17 ibid 143.

18 ibid.

19 K.W. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139. See seminal works exploring intersectionality theory, including, P.H. Collins, *Black Feminist Thought* (2nd edn, Routledge 2009); E. Grabham, D. Cooper, J. Krishnadas and D. Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish 2009); P.H. Collins and S. Bilge, *Intersectionality* (Polity Press 2016); A. Hancock, *An Intellectual History of Intersectionality* (OUP 2016); V.M. May, *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (Routledge 2015).

20 The 'sex-plus' and 'race-plus' form of intersectionality has been recognised in *Jefferies v Harris County Community Action Association* (1980) 615 F2d 1025, 1033 (5th Cir); *Judge v Mar*sh (1986) 649 F Supp 770 (US District Court for the District of Columbia); *Lam v University of Hawaii* (1994) 40 F3d 1551, 1562 (9th Cir); *Coleman v B-G Maintainence Management, Inc* (1997) 108 F3d 1199 (10th Cir); *Vasquez v County of LA* (2003) 349 F3d 634 (9th Cir).

age. This approach was instated by the referring court in the way it formulated the three questions, and was later adopted in Advocate General Kokott's opinion. Whilst she began by pointing out that 'the Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation';[21] her legal assessment in fact treated 'the issue of discrimination from three different perspectives which are each the subject of a separate question.'[22] The CJEU followed suit – perhaps constricted by design of a reference proceeding and limited by the referring court's formulation – by examining the claim as self-standing issues of discrimination based on each ground first, and as intersectional discrimination, only in the alternative. This however was far from what the case was actually about.

The central issue before the Court was whether a rule in an occupational benefit scheme, which limited the payment of survivor's pension by a requirement that the member of the scheme and the surviving partner must have married or entered a civil partnership prior to the member's 60th birthday, be considered discriminatory when the national law did not allow the member to marry or to enter a civil partnership with his same-sex partner until after he turned 60. Thus, the claim was about discrimination specifically against those who were same-sex partners and could not enter into civil partnerships before they turned 60 – a group defined both by its sexual orientation and age at the same time. The impugned rule potentially affected *all gays who turned 60 before 2011*, denying their partners any possibility of claiming under the occupational benefit scheme, even when their partnerships were legally recognised since 2011. The rule did *not*

[21] Opinion of Advocate General Kokott delivered on 30 June 2016 in *Parris* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0443 (last accessed 15 February 2017) [4].

[22] ibid [30].

discriminate against gays per se since those born after 1951 could enter into civil partnerships before they turned 60 and their same-sex partners could then avail survivor's pension. In this way, it could not be seen as discrimination on the basis of sexual orientation alone. At the same time, while the rule did discriminate against those who did not marry by the time they turned 60, the rule could be considered legitimate as a clampdown on deathbed marriages solemnised simply to enable someone to claim a survivor's pension.[23] Age discrimination, even if it existed, may have appeared justified in this case.[24] The claim was thus neither about sexual orientation nor age exclusively, but about both of them at the same time. It was thus a case of intersectional discrimination at its heart.

The tendency to treat intersectional claims as based on each ground separately marks, what Crenshaw called, 'the dominant conception'[25] of thinking about discrimination along 'a single categorical axis'.[26] This dominant conception inhibits the possibility of appreciating discrimination against those belonging to multiple disadvantaged groups. For example, Crenshaw argued that the exclusive focus on sex or race protected those disadvantaged solely by their sex (white women) and race (Black men) but privileged in every other way (in relation to their race, sex, disability, sexual orientation, age, religion, etc). This eclipsed the experiences of Black women defined both by their sex and race in ways which were similar to and different from white women and Black men. Since Black women *were* both women and Blacks, some of their experiences of sex discrimination coincided with those of white women (say, of gender violence) while others coincided with experiences of race discrimination suffered by Black men (say, of slavery and segregation).

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[23] ibid [72]–[73].

[24] The Court, unlike Advocate General Kokott, did not examine the legitimacy of the provision in this way but simply applied the exception to age discrimination contained in Article 6(2) of the Directive. This approach is critiqued in Part E below.

[25] Crenshaw (n 19) 150.

[26] ibid 140.

But they also suffered some unique forms of discrimination which were not faced by white women or Black men at all. Thus, in the case of *DeGraffenreid*, while both white women and Black men were hired and retained by General Motors, it was mainly Black women employees who were dismissed under the 'last hired first fired' policy since they entered employment much after white women and Black men, and hence were first to lose their jobs. Their intersectional position was thus characterised by both shared (like of sexism and racism), and well as, different experiences (like in *DeGraffenreid*) based on gender and race simultaneously. According to Crenshaw, in seeing discrimination against Black women as either similar to or different from discrimination based on the individual grounds of gender and race, rather than both of them combined, the dominant conception of single-axis discrimination had obliterated intersectionality from discrimination law.[27]

The CJEU falls in this trap. It sees discrimination against Mr Parris and his partner defined exclusively as sexual orientation or age discrimination rather than seeing the intersectional patterns of disadvantage created by the interaction of grounds. It thus ignores the distinct experience of discrimination against older gays who not only suffer both homophobia and ageism generally, but also unique disadvantages which result from the combination of both—like the disadvantage accruing from the impugned rule which excluded them from survivor's pension. In this way, the Court fails to recognise, what Conaghan calls, the 'qualitatively distinct'[28] nature of intersectional discrimination by imposing an artificial limitation upon EU law as excluding the 'combined effect' of sexual orientation and age from the purview of the non-discrimination guarantee. This limitation

[27] Crenshaw (n 19) 149. See also S. Cho, K. Crenshaw and L. McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 *Signs* 785, 787.

[28] J. Conaghan, 'Response to the Discrimination Law Review's Consultation Paper: "A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain"' (2007) at https://www.kent.ac.uk/clgs/news-and-events/news.html (last accessed 15 February 2017).

is artificial in that the plain language of Directive 2000/78 does not support it. Article 2 defining the 'concept of discrimination' gives no indication of limiting the remit of anti-discrimination to only discrete and mutually exclusive forms of discrimination based on a single ground alone. For example, Article 2(1) provides that: 'the principle of "equal treatment" shall mean that there shall be no direct or indirect discrimination *whatsoever on any of the grounds*'. Recital 3 specifically recognises that 'women are often the victims of *multiple discrimination*' thus acknowledging the relevance of other grounds in the causal equation of discrimination against women. There is no indication in the text of the Directive that 'multiple discrimination' or discrimination 'on any of the grounds' is to be interpreted as excluding combined forms of discrimination which cannot be proved individually in relation to each ground. In fact, as Dagmar Schiek confirms: 'we can safely assume that international and European organisations use the term 'multiple discrimination' as [an] overarching notion.'[29] So the explicit recognition of multiple discrimination in the recital, and the unambiguously broad definitions of direct and indirect discrimination under Article 2(2), support the case for interpreting these guarantees to include discrimination based on multiple grounds including discrimination which is intersectional in nature, i.e. based on the combined effects of two or more grounds considered together. Thus, the key to appreciating the qualitatively distinct nature of intersectional discrimination associated with multiple grounds lies in the possibility of interpreting the provisions recognising multiple discrimination to not only quantitatively include multiple grounds, but more importantly, also the conceptual idea that these multiple grounds do not necessarily act independently, sequentially or additively, but also synergistically.

[29] D. Schiek, 'Executive Summary' in Burri and Schiek (n 2) [2.1] ('There is no indication that the term 'multiple' is meant to refer to any specific form of connection between the different strands of disadvantage.').

This has been the central takeaway of EU discrimination scholarship in the last decade which has tried to extend the interpretation of non-discrimination provisions to include cases of intersectional discrimination. In one of the early accounts of intersectionality in EU law, Gay Moon argues that whilst the equality Directives 'do not expressly provide for multiple discrimination, [they] do not exclude it and obliquely acknowledge its existence. Both the Race Equality Directive and the Equal Treatment Directives recognise that different grounds may intersect.'[30] Citing Recital 14 of the Race Directive which also recognises that women could be victims of multiple discrimination, Gay Moon seems to suggest that the nod towards multiple discrimination may stand in for recognising intersectional forms of multiple discrimination, i.e. intersectional discrimination. The European Commission's 2007 Report identifies more such instances:

> In relation to gender the preamble to both the Race and the Employment Equality Directives stipulate that 'in implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.'[31]

> Recitals 2, 3, and 10 of the Employment Equality Directive also make it clear that the Directive is intended to work together with existing provisions in relation to race and gender, because they make direct reference to the other grounds. The Directive also contemplates situations where there could be an intersection between religion and other rights (Article 4 [2]) and age and gender rights (Article 6 [2]).[32]

Given these enabling provisions, Dagmar Schiek, Sandra Fredman and Karon Monaghan have independently argued that a separate provision explicitly recognising intersectional discrimination may not be needed in EU law at all.[33] Both consider the

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[30] G. Moon, 'Multiple Discrimination: Justice for the Whole Person' (2009) 2 *Journal of the European Roma Rights Centre* 5.

[31] 'Tackling Multiple Discrimination Practices, Policies and Laws' (n 2) 19.

[32] ibid 20.

[33] Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law' (n 3) 464-65; Fredman, 'Intersectional Discrimination' (n 2) 12; Monaghan (n 3) 27. See also J. Mulder and D. Schiek, 'Intersectionality in EU Law: A Critical Re-appraisal' in Schiek and Lawson (n 3); R.A. Elman, 'Intersectionality, Inequality, and EU Law' in E. Prügl and M. Thiel (eds), *Diversity in the European Union* (Palgrave MacMillan 2009); A. Phoenix and P. Pattynama, 'Intersectionality' (2006) 13 European Journal of Women's Studies 187; B. Hepple, Equality: *The New Legal Framework* (1st edn, 2011) 61-66. Cf M.V.

existing framework to be sufficiently accommodating of a broader vision of discrimination law which can accommodate intersectional claims. Thus, Ruth Nielsen, Dagmar Schiek, Susanne Burri, Sacha Prechal, and Anna Lawson have systematically reviewed the CJEU's output from the standpoint of intersectionality, repeatedly pushing for constant reflection and engagement with multiple grounds and their synergistic impact in creating intersectional patterns of disadvantage.[34] In fact, Sandra Fredman's 2016 EU Report shows that the CJEU jurisprudence has implicitly embraced this idea.[35] Diamond Ashiagbor goes a step further and has posited a 'hybrid' approach combining Directives with alternatives to hard law, such as gender mainstreaming and diversity management, for recognising intersectional discrimination in EU law.[36] Others have explored the vast possibilities in EU institutional structures for addressing intersectionality through policy.[37]

Parris was the first real possibility for the Court to break through the confines of a limited model of single-axis discrimination, and acknowledge these strides made in EU law judicially. It was prompted by Advocate General Kokott to do so while she answered the final question on intersectional discrimination where she cited the prolific literature on the

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Onufrio, 'Intersectional Discrimination in the European Legal Systems: Toward a Common Solution?' (2014) 14(2) *International Journal of Discrimination and the Law* 126, 137 ('Only a change in the EU legislation in the direction of a clear prohibition against multiple discrimination and more concrete measures for protection against this phenomenon would be the means for securing change at national level.')

[34] D. Schiek, 'Intersectionality and the Notion of Disability in EU Discrimination Law' (2016) 53 *Common Market Law Review* 35; R. Nielsen, 'Is European Union Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet? Precaution against Neglecting Intersectional Cases in European Union Non-Discrimination law' in Schiek and Chege (n 3); S. Burri and S. Prechal, 'Comparative Approaches to Gender Equality and Non-discrimination within Europe' in Schiek and Chege (n 3); A. Lawson, 'Disadvantage at the Intersection of Race and Disability: Key Challenges for EU Non-Discrimination Law' in Schiek and Lawson (n 3).

[35] See Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (n 3) 71–79.

[36] D. Ashiagbor, 'Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance' (2008) 61 *Current Legal Problems* 265. See also M. Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211.

[37] A. Krizsan, H. Skjeie and J. Squires (eds), *Institutionalising Intersectionality: The Changing Nature of European Equality Regimes* (Palgrave Macmillian 2012) and L. Rolandsen Agustin, *Gender Equality, Intersectionality, and Diversity in Europe* (Palgrave Macmillan 2013).

subject.[38] In failing to take the cue from her opinion, the Court failed in developing the transformative potential of EU law to recognise a 'new category of discrimination'[39], but more immediately, also misunderstood and defeated a rare but genuine claim of intersectional discrimination based on two grounds.

D. RESPONDING TO INTERSECTIONAL DISCRIMINATION

Claims as in *Parris* do not just require reimagining discrimination to include intersectional forms of disadvantage based on multiple grounds, but also space to be doctrinally accommodated within the practice of discrimination law. That is to say, it is not just about the normative limitation imposed by the CJEU in *Parris* by which it splintered the intersectional claim into its constituent grounds and failed to appreciate their 'combined effect', but also about how this misstep fed into the way discrimination was examined—in terms of identifying the relevant grounds, classifying the discrimination at play—whether direct or indirect, and testing whether such discrimination was actually unlawful.

To recall, the claim in *Parris* was about a rule based on the criterion of age (to marry or enter civil partnership before members turns 60), which put those with a particular sexual orientation (gays) *and* with a particular age (those who turned 60 before 2011, i.e. born before 1951) at a disadvantage compared with others. It straddles the categories of direct and indirect discrimination in a unique way such that even though the rule is directly based on the criterion of age it had a particular indirect intersectional impact on *gays who turned 60 before 2011*, on the basis of their sexual orientation and age. This, the Court failed to appreciate. In artificially segregating the claim based on sexual orientation and age, the

[38] Advocate General Kokott (n 21) [74]–[80].
[39] *Parris* (n 6) [80].

Court also imposed strict boundaries between the categories of direct and indirect discrimination based on each ground. Thus it dismissed the possibility of either direct or indirect discrimination based on sexual orientation on account of Recital 22 of the Directive, and found direct age discrimination to be justified under Article 6(2) of the Directive. None of these categories illuminated the actual disadvantage at play which had to do with a criterion based explicitly on a ground (age) but leading to indirect intersectional impact based on two grounds (sexual orientation and age). In doing so, the Court overlooked its own jurisprudence.

This intermediate category which straddles both direct and indirect discrimination had been previously recognised by the CJEU in *Brachner*.[40] The case concerned a statutory provision which reserved an exceptional increase in pensions to those whose pensions were above EUR 746.99 per month. The percentage of women disadvantaged by this provision was found to be approximately 2.3 times higher than the percentage of men.[41] The Court concluded that the category of retired persons suffering disadvantage consisted of a significantly greater number of women than men. In this way, the Court found for indirect sex discrimination against the intersectional group of older women. The Court was no doubt assisted in this by the specific language of Article 4(1) of the Directive 79/7 which states that: 'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status'. The Directive is clear as to the prohibition of sex discrimination not only directly based on the grounds of sex but also indirectly affecting women on other grounds as well (like age), including marital or family status.

[40] Case C-123/10 *Brachner v Pensionsversicherungsanstalt* [2011] ECR I-000 (CJEU).
[41] ibid [29].

As Sandra Fredman argues, *Brachner* takes a 'capacious' view of a single ground of discrimination in order to address intersectionality within the existing contours of EU discrimination law.[42] Such a view – which helps a court appreciate the complexity of disadvantage associated with a single ground by considering how it interacts with other grounds – may also, in the final analysis, embrace intersectionality from *within* the individual grounds. This point is explored further in the next Section. But *Brachner* also shows that it is not necessarily a capacious or an intersectional approach which is alone sufficient in responding to intersectionality, but a doctrinal appreciation of the fluidity between direct and indirect discrimination based on multiple grounds in intersectional claims. In that sense, it may not have been sufficient for the *Parris* Court to accept that the claim was based on both sexual orientation and age, if in turn it exclusively looked for direct discrimination or indirect discrimination based on both. The impugned rule in *Parris* was neither based directly on both the grounds nor was it based on a neutral criterion and causing indirect discrimination on both. The criterion was actually directly based on age while leading to indirect intersectional discrimination based on sexual orientation and age. Such structural inequality, which was earlier acknowledged in *Brachner*, slipped through the cracks of both direct and indirect discrimination in *Parris*.

Since the CJEU disagreed with the conceptual framing of intersectional discrimination as based on two grounds combined, it could not doctrinally appreciate the complex character of discrimination as based directly on one ground (age) but causing indirect intersectional impact on that ground (age) combined with another (sexual orientation). Consequently, it could not appreciate the actual harm involved in the claim. What was the 'less favourable' treatment or 'particular disadvantage' being challenged by

[42] Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (n 3) 72.

the claimant? Was it about the redistributive impact of exclusion from benefits or entitlements? Or, as the CJEU has recognised, about 'stereotypes and prejudices'[43] and other 'humiliating and demoralising impact'[44] based on grounds? The discrimination in *Parris* perhaps embodied both these dimensions. Besides the obvious redistributive impact of being disentitled to survivor's pension, the exclusion also signified the loss of dignity and equal moral worth of older gay couples. It marked the continuing effects of their historical marginalisation from social institutions like marriage and civil partnerships as well as from employment and related benefits. Although gay and aged persons generally suffered the effects of homophobia and ageism, the impugned rule did not impact younger gays (born after 1951) and other older heterosexuals – both of whom were free to marry or contract civil partnerships and claim the attendant benefits. Causally speaking, the impugned rule impacted only and particularly older same-sex couples in that in addition to the general homophobia and ageism they also suffered unique redistributive and recognition harms. None of these harms were recognised in *Parris*.

The real casualty lies herein. That discrimination in this case failed to be revealed as such. This is primarily a diagnostic loss where the Court misses whether and on what basis does discrimination occur at all. In case of intersectional discrimination this can only be appreciated if one is open to considering that discrimination can be based on the 'combined effect' of multiple grounds in fact. Thus, ultimately the normative thrust of intersectionality is connected to the doctrinal purpose of discrimination law. Intersectionality transforms the way discrimination is understood conceptually and also the way in which it is doctrinally

[43] Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECR I-0000 (CJEU) [82].

[44] Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187 (CJEU) [15].

established in terms of identifying relevant grounds, delineating direct and indirect discrimination, and appreciating the actual harm accrued in discrimination claims.

E. ESTABLISHING SINGLE GROUND DISCRIMINATION IN *PARRIS*

Following the referring Court's design, the Court in *Parris* considered the claim first, as a matter of indirect discrimination based on sexual orientation; and then failing the ground of sexual orientation, as a matter of direct age discrimination. Eventually neither of these characterisations succeeded in revealing the disadvantage complained of by the claimant. It is useful to see, even if in the alternative, why the Court's single ground analysis of sexual orientation and age also fails to convince as a matter of EU law.

With respect to indirect discrimination based on sexual orientation, the Court simply cited Recital 22 as justifying such discrimination. Recital 22 provides that: 'This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.' It concluded that the Recital did not oblige Ireland to provide for civil partnerships for same-sex couples and thus consequently could not require Ireland to give 'retrospective effect' to the Civil Partnership Act to allow same-sex partners to claim benefits arising therefrom.[45] Two problems appear with the way the Court applied Recital 22. First, the Court simply misconstrues the claim as asking for 'retrospective' benefits to be claimed by the recognition of same-sex civil partnership. As Advocate General Kokott reminded in her opinion, Mr Parris and his partner were only *prospectively* claiming benefits based on their now legally recognised civil partnership. They were, in her words, 'simply defending themselves against a term contained in the occupational pension scheme at issue — the 60-

[45] *Parris* (n 6) [60].

year age limit — which was laid down in the past but discriminates against them today.'[46] The Court in *Maruko and Romer* had previously recognised such a claim by extending benefits to same-sex couples which originated *before* the same-sex partnerships were legally recognised.[47] The situation in *Parris* does not seem materially different but the Court fails to distinguish between, or to even engage with its own jurisprudence in *Maruko and Romer*. Secondly, the Court misapplied the exception in that it completely let it override the prohibition of discrimination under Articles 1 and 2 of the Directive 2000/78. This is a U-turn from the Grand Chamber decision in *Maruko* where it had specifically considered the question whether the content of Recital 22 of the preamble could restrict the scope of the Directive 2000/78. The Court had answered the question thus:

> Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination.[48]

The Court in *Parris* neither followed its own opinion in *Maruko* nor did it consider the question of application of Recital 22 independently. While it did cite *Maruko*'s answer to the question, it simply went on to find that the Recital carried decisive force without more. With this, *Parris* set a reverse trend in EU law for a perambulatory exception to have greater force than the non-discrimination guarantee and the binding content of an equality Directive.

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[46] Advocate General Kokott (n 21) [104].

[47] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757 (CJEU) [19] [20] [79]; Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* (CJEU) [2011] ECR I-3591 [22] [66]. See analyses of these cases in R. Wintemute, 'Does EU Law Permit Unequal Survivor's Pensions for Same-Sex Couples?' (2014) 43 *Industrial Law Journal* 506.

[48] *Maruko*, ibid [59] (citing Case C-372/04 *Yvonne Watts v Bedford Primary Care Trust, Secretary of State for Health* [2006] ECR I-4325 (CJEU) [92]; and Case C-444/05 *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmation* [2007] ECR I-3185 (CJEU) [23]).

What is even more extraordinary is that the Court does not at any point apply the proportionality analysis to assess the legality of the impugned rule. The mere availability of exceptions justified discrimination per se. Thus, in the case of direct age discrimination, the Court justified the rule in light of Article 6(2) of the Directive 2000/78 which states that:

> Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Based on this, the Court simply concluded that: 'the pension scheme fixes an age for entitlement to an old age benefit, and that, consequently, the rule is covered by Article 6(2) of the Directive 2000/78.'[49] Article 6(2) is indeed an exception to discrimination under Article 2(2) but there are two problems with the way the Court applied the exception. First, the Court does not consider the full import of Article 6 titled 'justification of differences of treatment on grounds of age', especially Article 6(1) which provides that Member States could justify age discrimination in employment if it is 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.' Does Article 6(2) operate uninhibited of the proportionality requirement in Article 6(1)? According to the *Parris* approach, the answer appears to be in the affirmative. This though is an odd result given that proportionality is not simply a condition for discrimination to be sustained but is also recognised as a general principle of EU law.[50] The opinion of Advocate General Kokott had thus engaged with the proportionality analysis at length for both sexual

[49] *Parris* (n 6) [75].

[50] Case C-137/85 *Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 4587 (CJEU) [15]; Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755 (CJEU) [57]; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453 (CJEU) [122]. See also the discussion in Colm O'Cinneide, 'Age Discrimination and European Law', European Commission Report (2005) which explains the 'rigorous standard of justification required by Article 6(1)'.

orientation and age discrimination.[51] The lack of *any* proportionality analysis in adjudging the validity of an exception goes beyond the established contours of not just discrimination law but EU law in general.[52] It is also inconsistent with Recital 25 which indicates that although age discrimination *may* be justified *under certain circumstances* and *specific provisions* made by the Member States, it remains 'essential to distinguish between differences in treatment which are justified…and discrimination which must be prohibited.' The Court did not consider whether the impugned rule was *actually* one to be justifiably covered within Article 6(2), but simply found it lawful because it *potentially* could be justified under the Directive. It thus bypassed any consideration of a narrower rule which excluded same-sex couples who had reached the age of 60 before 2011.[53] Instead, the Court delimited the scope of anti-discrimination in Article 2(2) by allowing an exception such as in Article 6(2) to operate unencumbered of considerations of proportionality. Given that an exception must be construed narrowly or at least narrower than the main provision to which it is an exception, the Court's reading of Article 6(2) appears suspect.[54]

Secondly, and as a consequence of such a reading, the Court failed to reverse the burden of proof per Article 10 of Directive 2000/78. According to Article 10, while it is for

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[51] Advocate General Kokott (n 21) [74]–[99] (for sexual orientation discrimination) and [119]–[142] (for age discrimination).

[52] See esp G. Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105; J.H. Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239.

[53] See for example Case C-117/01 *KB v National Health Service Pensions Agency* [2004] ECR I-541 (CJEU). See also R. Wintemute, 'Same-sex Survivor Pensions in the CJEU (Parris) and the UKSC (Walker)' (2017) *UK Human Rights Blog* at https://ukhumanrightsblog.com/2017/01/09/professor-robert-wintemute-same-sex-survivor-pensions-in-the-cjeu-parris-and-the-uksc-walker/comment-page-1/ (last accessed 27 January 2017) ('CJEU [in *Parris*] should have held that, to avoid sexual orientation discrimination, the pension scheme must exempt from its "marriage or civil partnership before 60" rule same-sex couples in which the employee was born before 1951 and who entered a civil partnership within a reasonable time after the change to Irish law in 2011. Such an exemption was particularly warranted in Parris, because the rule is aimed at "gold-diggers" or "bounty-hunters" who might seek to marry a retired employee in poor health, shortly before their death.').

[54] Case C-222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651 (CJEU); Case C-341/09 *Petersen v Berufungsausschuss Für Zahnärzte Für Den Bezirk Westfalen-Lippe* [2010] ECR I-47 (CJEU); Case C-447/09 *Prigge v Deutsche Lufthansa* [2011] IRLR 1052 (CJEU).

the claimant to establish 'facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.' Thus, the burden to prove that discrimination was justified per Article 6(2) should have been on the respondent. This is also acknowledged in Recital 31 which provides that: 'The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.' This burden was neither shifted back to nor discharged by the respondent, when the Court applied Article 6(2) as 'remov[ing] occupational pensions from the reach of the directive's provisions on age discrimination.'[55] In other words, the mere citation of Article 6(2) sufficed in negating the alleged discrimination under Article 2(2). Such a reading of Article 6(2) as completely overriding the principles of proportionality and equality (other than sex discrimination), appears to be against EU discrimination law which accepts both proportionality and equality as its cornerstones, accepted conventions of interpretations where exceptions or justification defences are to be read narrowly, and ultimately, rules of burden of proof which require exceptions or justifications to be *proven* rather than *stated* in order to succeed.

Ultimately the result was the same as in the case of Recital 22, in that the Court applied Article 6(2) as completely overriding anything contained in the Directive. Thus, any use of age – even when combined with other grounds like sexual orientation – was per se justified in the context of occupational social security schemes. This seems counterintuitive. The language of Article 6(2) does not indicate that Members States are free to choose a criteria of age combined with any other grounds. In fact, it explicitly

[55] E. Ellis and P. Watson (eds), *EU Anti-Discrimination Law* (2nd edn, OUP 2012) 418.

recognises that age and sex cannot be combined together to limit membership or entitlement to occupational social security schemes. Could the absence of an exclusion of combinations of age with other grounds like disability, religion, and sexual orientation from Article 6(2) indicate an acceptance of discrimination against older disabled persons, young Muslim men, or older gays like Mr Parris? This was the question the Court circumvented. In seeing the criterion as simply one based on age (direct discrimination) rather than one based on sexual orientation and age (indirect discrimination) in relation to those gay men and women born after 1951, it applied Article 6(2) without stopping to consider whether Article 6(2) could apply to a case like Mr Parris' at all.

What would have been the result had the Court applied exceptions and proportionality properly to its single ground analysis of sexual orientation and age? I would argue that the Court would have been able to appreciate intersectional discrimination in that case. The Court's jurisprudence indicates that a properly conducted and broadly construed single ground analysis may be capable of appreciating intersectional disadvantage for the purposes of establishing discrimination. As indicated above, *Brachner* is the paradigmatic case of this capacious approach 'to interpreting some of the existing grounds when cases [are] brought by claimants who experience specific disadvantage because of the confluence of different identities.'[56] Thus in *Brachner*, the CJEU found sex discrimination against an intersectional group of older women because the differential rule in the pension scheme substantially and specifically disadvantaged older women pensioners in comparison with older male pensioners. The Court thus accounted for age within the ground of sex to appreciate the intersectional disadvantage suffered in particular by a group (older women) defined by two grounds—age and sex. Such an intersectional

[56] Fredman, 'Intersectional Discrimination' (n 2) 71.

analysis conducted within a capacious view of a single ground appears common in the Court's sex discrimination case law especially in relation to claims concerning women's age.[57] For example, in another instance of a case specifically advanced on multiple grounds of sex and age, the Court did not follow the intersectional route suggested by the claimant and even rejected the claim of age discrimination; but instead went about finding for sex discrimination anyway.[58] It did so by interpreting sex discrimination as prohibiting not just differential pension benefits based on sex alone, but also other factors like age associated with sex, unless they were objectively justified. The Court thus not only accounted for multiple grounds within a single ground but also interpreted them intersectionally—by appreciating the impact of the impugned provision on a specific intersectional group of older women for whom patterns of ageism and sexism combined to result into a significant redistributive disadvantage of obtaining lower pension over a length of time.

This discussion makes clear that the critical bite of intersectionality does not reside in the multiplicity of grounds as much as it resides in forms of analyses which construe different patterns of disadvantages as occurring simultaneously. The CJEU's own jurisprudence indicates this form of intersectional analysis developed in relation to a capacious view of individual grounds. The benefit of the capacious view is that it allows the disadvantage accrued by claimant whose position is defined by multiple and intersecting grounds to be appreciated, where a narrow and rigid view of each ground considered in isolation would not reveal such disadvantage. In *Parris*, while neither sexual orientation nor age discrimination could be established taken separately, a capacious single-ground analysis based on either, which interpreted the exceptions narrowly, and followed

[57] See *Kücükdeveci* (n 7); *Mangold* (n 7); *Marshall* (n 7); Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit* [2003] ECR I-9027 (CJEU); Case C-187/00 *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-2741 (CJEU); C-408/92 *Smith v Avdel Systems Ltd* [1995] ICR 596 (CJEU).

[58] *Lindorfer* (n 7) [50]–[60].

principles of burden of proof and proportionality, could have also allowed the intersectional claim to succeed.

F. CONCLUSION

Parris was a straightforward case of intersectional discrimination. It posed none of the typical problems imagined to be in the way of recognising intersectional discrimination in EU law. It was based on two grounds – sexual orientation and age – explicitly enumerated in a single equality Directive of 2000/78. It required no complicated manoeuvring for the Court to interpret across multiple equality Directives differing in their material scope. The Court did not need to identify any analogous grounds of discrimination or look for disguised comparators to establish discrimination. All the Court needed in order to appreciate the claim was to see the patterns of disadvantage created by sexual orientation and age together. The artificial limitation on discrimination as excluding combined forms of discrimination based on multiple grounds cost the Court the qualitative appreciation of intersectional discrimination and the actual disadvantage suffered by the claimant. But as the note agued, even a capacious view of single ground discrimination per *Brachner*, would have allowed the *Parris* claim to succeed. This would have been in line with the CJEU's distinctive way of addressing intersectionality from *within*—using its single ground approach and traditional tools in discrimination law like proportionality and burden of proof to address complex forms of disadvantage. So ultimately, Mr Parris' situation could have been addressed either by pursuing the intersectional route for the first time, or by undertaking a capacious single ground analysis of sexual orientation and age discrimination. In doing neither, the CJEU in *Parris* fails not only to recognise intersectional

discrimination explicitly, but also in actually addressing it within its traditional but progressive single ground framework.